IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-344

COUNCIL OF SUPERVISORS AND ADMINISTRATORS OF THE CITY OF NEW YORK, LOCAL 1, SASOC, AFL-CIO,
Petitioner,

v.

BOSTON CHANCE, LOUIS MERCADO, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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Opinions Below

The unreported order of the district court is reprinted at 11 CCH E.P.D. ¶ 10,632. The opinions of the court of appeals are reported at 534 F.2d 993 and are set out in the appendix to the petition.

Supplemental Statement of the Case

Plaintiffs (respondents here) brought this class action in September 1970 under 42 U.S.C. §§ 1981 and 1983, and under various provisions of the New York State Consti-

tution and Education Law,[1] challenging the practices used to select supervisory personnel in the New York City public school system on the grounds that those practices were irrational, invalid, and unreliable and that they discriminated unlawfully against minority groups. The named defendants were and are the Board of Examiners and the Board of Education of the City of New York, the members of those boards, and other public officials charged with the administration and operation of the school system.

In October 1970, the petitioner here, the Council of Supervisors and Administrators of the City of New York, Local 1, SASOC, AFL-CIO (hereinafter "CSA" or "petitioner"), made its first motion to intervene as a party to the action pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure. The motion was denied on the grounds that CSA did not have a sufficient legal interest in the proceedings and that, in any event, CSA's alleged interest would be adequately represented by the existing parties and by the independent counsel retained by the Board of Examiners to defend the suit. 51 F.R.D. 156 (S.D.N.Y. 1970). CSA never appealed this decision.

After extensive proceedings, the district court found that the challenged selection practices were unlawful and granted preliminary injunctive relief against the defendants. 330 F.Supp. 203 (S.D.N.Y. 1971). This decision was affirmed in all respects by the court of appeals. 458 F.2d 1167 (2d Cir. 1972).

Extensive negotiations and further proceedings resulted in the entry, on July 12, 1973, of a final consent judgment against the defendant Board of Examiners and a modified

[1] N.Y. Const., Art. 5, § 6; N.Y. Educ. Law §§ 2590-j(3)(a)(1), 2569(1), 2573(10) (McKinney 1970). These provisions establish the basic parameters of the New York City Board of Education's civil service system.

preliminary injunction against the defendant Board of Education. 8 CCH E.P.D. ¶ 9520 (S.D.N.Y. 1973). These orders were affirmed on an appeal taken by the Board of Education, 496 F.2d 820 (2d Cir. 1974), and the Board of Education subsequently entered its consent to the July 12, 1973 judgment. This consent judgment mandated the development of a permanent new selection procedure and the institution of an interim system for the appointment and licensing of supervisory personnel. Under this interim procedure, supervisors could be licensed if they had filled a vacancy on an acting basis for at least five months and were found by the Board of Examiners to have performed satisfactorily in that capacity.

In July 1974, the Board of Education began contemplating the "excessing" of a number of supervisors and submitted proposed rules to govern that process. These rules would have required that supervisory personnel whose positions are abolished and those persons junior to them holding similar or lower positions, be relocated, demoted, or terminated in inverse order of their seniority. Plaintiffs challenged these proposed rules on the ground that they would effectively abrogate rights obtained under the consent judgment and would have a serious discriminatory impact on recently appointed minority supervisors.

At this point, CSA moved again for general intervention in the proceedings concerning the proposed excessing rules. The district court entered another order denying the motion but granted CSA limited intervention "in proceedings before this Court addressed to interpretation, modification or abrogation of provisions regarding 'excessing' of supervisory personnel in the currently effective collective bargaining agreement between CSA and defendant Board of Education . . ." (Order entered July 18, 1974).

On the merits of the dispute concerning the seniority excessing rules, the district court entered an order in November 1974, and a modified order in February 1975, requiring that any excessing be carried out without affecting the proportions of black and Hispanic supervisors in the school system. The defendant Board of Education and the intervenor CSA appealed. In its brief to the court of appeals, CSA relied on the district court's July 1974 grant of limited intervention as the basis for its status as an appellant in the litigation. CSA did not appeal from or contest the district court's denial of its motion for general intervention.

On the merits of the appeal, a majority of the court of appeals panel reversed the district court's order and remanded the case with directions to fashion a remedy according constructive seniority to individual class members who had failed prior discriminatory examinations. 534 F.2d 993, 999 (2d Cir. 1976) (11a). After this Court decided *Franks* v. *Bowman Transportation Co.*, 47 L.Ed. 2d 444 (1976), the court of appeals panel modified its decree to provide that, on remand, constructive seniority should also be accorded to individual class members who could prove that they had failed to apply for or take prior supervisory examinations because they reasonably believed those examinations to be discriminatory and unrelated to job performance. 534 F.2d at 1007 (30a). Petitioner CSA seeks a writ of certiorari to review these decisions.

In July 1976, the defendant Board of Examiners, still represented by the same independent counsel referred to in the district court's denial of CSA's original motion to intervene in 1970, filed a notice of appeal from a separate district court order, concerning procedures for the selection, appointment, and licensing of supervisory personnel.

One of the issues which the Board of Examiners has presented for review by the court of appeals is essentially the same as the first question presented by the petitioner here: *i.e.*, whether this case should be dismissed in its entirety on the basis of this Court's decision in *Washington* v. *Davis*, 48 L.Ed. 2d 597 (1976). This appeal is now pending before the court of appeals (No. 76-7348, 2d Cir.), and CSA has been granted *amicus curiae* status in it.

Reasons For Denying the Writ

1. Petitioner has been granted only limited intervention in this case[2] and is not entitled to any review of the underlying determination of liability embodied in the July 1973 consent judgment. Petitioner's repeated motions for general intervention as a party have been denied by three successive district judges; petitioner has never taken a

[2] In its petition (p. 9), CSA states that it "moved to intervene as a party defendant, and its motion was granted by the District Court on July 18, 1974." In fact, in its motion and proposed order, CSA requested leave to intervene "for the purpose of representing the interests of its members in connection with consideration of a plan for excessing supervisory employees which will be presented to this Court" (CSA Proposed Order filed July 10, 1974). This motion was denied. The language of the district court's order, from which petitioner never appealed, is as follows:

> 1. The motion of CSA is granted insofar and only insofar as it seeks participation for CSA as intervenor in proceedings before this Court addressed to interpretation, modification or abrogation of provisions regarding "excessing" of supervisory personnel in the currently effective collective bargaining agreement between CSA and defendant Board of Education, and specifically the provisions of Article VII, L of a certain agreement between said contracting parties covering the period October 1, 1972-October 1, 1975;
>
> 2. In all respects other than those set forth above, the motion of CSA is denied.

timely appeal from any of these orders;[3] and petitioner has never sought this Court's review of any of these denials.[4] Its indirect attempt to gain in this Court a right which has consistently been denied it below, without appeal, is clearly barred by time. Moreover, petitioner has not made any showing of changed circumstances which might justify overturning these decisions of the courts

[3] These orders were clearly appealable. *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967).

[4] The opinion denying CSA's first motion to intervene is reported at 51 F.R.D. 156 (S.D.N.Y. 1970) (Mansfield, J.). During the proceedings culminating in the entry of the July 1973 consent judgment, another CSA motion to intervene was denied, 6 CCH E.P.D. ¶ 8977 (S.D.N.Y. 1973) (Mansfield, J.), and CSA again failed to appeal.

Later in 1973, when a dispute arose concerning the filling of supervisory vacancies, CSA participated in district court proceedings on this issue, and the court stated in a December 1973 decision that CSA had been "granted the rights of an intervenor for the limited purpose of contesting the issue raised by plaintiffs with respect to the transfer provisions of the CSA agreement." 7 CCH E.P.D. ¶ 9084, at p. 6576 (S.D.N.Y. 1973) (Mansfield, J.).

In January 1974, in response to yet another CSA motion for unlimited intervention, this time addressed to the second district judge assigned to the case, the court reaffirmed the limited intervention rights specified in the December 1973 order, but denied CSA's request for general intervention. (Endorsement on Order To Show Cause To Intervene, Jan. 21, 1974) (Tyler, J.). Once again, CSA did not appeal the denial. When it later attempted to raise this issue on an appeal on the merits from a subsequent order declining to rescind the December 1973 order, its appeal was dismissed without opinion. 497 F.2d 919 (2d Cir. 1974).

CSA's next attempt to intervene resulted in the order of July 18, 1974 (Tyler, J.), which is reprinted in the preceding footnote, and from which CSA never appealed.

In April 1976, prior to final action by the court of appeals on the decision which CSA now asks this Court to review, and subsequent to the assignment to the case of its third successive district judge, CSA made still another motion in the district court for unlimited intervention. In an unpublished order dated May 2, 1976, and for the reasons stated in previous orders denying previous motions, the court (Pollack, J.) again denied CSA's motion to intervene. As in the past, CSA did not appeal the denial.

below.[5] Any interest which petitioner might have in the underlying liability issues continues to be diligently, competently, and aggressively represented by the Board of Examiners and its independent counsel in the appeal which is now pending before the court of appeals (No. 76-7348, 2d Cir.). Finally, the grant of limited intervention to petitioner, to contest certain aspects of the relief after liability had been determined, has ample precedent with no conflict in the circuits,[6] and it is in keeping with the settled rule "that intervention will not be allowed for the purpose of impeaching a decree already made." *United States* v. *California Cooperative Canneries*, 279 U.S. 553, 556 (1929); *Stell* v. *Savannah-Chatham County Board of Education*, 255 F.Supp. 88, 92 (S.D. Ga. 1966). Since petitioner is not and never has been a party to this case on the underlying question of liability, it is not entitled to seek review on the merits of that issue. 28 U.S.C. § 1254(1). See *UAW Local 283* v. *Scofield*, 382 U.S. 205, 208-09 (1965); *Brotherhood of Railroad Trainmen* v. *Baltimore & O.R.R.*, 331 U.S. 519, 524 (1947).

2. Even if petitioner were entitled to seek review of the underlying determination of liability this Court's decision in *Washington* v. *Davis*, 48 L.Ed.2d 597 (1976), would not require any modification of that determination. The Court held in *Davis* that *de facto* racial impact alone, without

[5] CSA apparently believes that the recent decision in *Washington* v. *Davis*, 48 L.Ed.2d 597 (1976), somehow revives the claim for unlimited intervention and makes its sudden reassertion here timely. However, *Davis* does nothing to modify the facts or the law on that claim. Even if the *Davis* decision has some bearing on the merits of the determination of liability in this case, it has nothing whatsoever to do with the correctness and finality of the repeated denials of intervention on that issue.

[6] *EEOC* v. *American Tel. & Tel. Co.*, 506 F.2d 735 (5th Cir. 1974); *Spangler* v. *Pasadena City Bd. of Educ.*, 427 F.2d 1352 (9th Cir. 1970); *Smuck* v. *Hobson*, 408 F.2d 175 (D.C. Cir. 1969); *Moore* v. *Tangipahoa Parish*, 298 F.Supp. 288 (E.D. La. 1969).

some evidence of a discriminatory racial purpose, will not trigger the "rigid scrutiny" test of equal protection review. The petition is wrong in suggesting that the 1972 decision of the court of appeals in this case was based on constitutional standards which were overturned by *Davis*. Rather, this court of appeals decision granting preliminary relief expressly acknowledged the *Davis* issue and found it unnecessary to reach "this most difficult question" because

> "the present examinations were not found to be job-related and thus are 'wholly irrelevant to the achievement of a valid state objective' . . . . The Board, then, failed to meet its burden even under the rational relationship standard, which would be the least justification that the Constitution requires." 458 F.2d 1167, 1177-78 (2d Cir. 1972).

Nothing in *Davis* requires any reconsideration of this decision. Moreover, even if the court of appeals had applied a "rigid scrutiny" standard, its decision would remain fully supportable on the basis of plaintiffs' claims under 42 U.S.C. § 1981 and under provisions of New York law requiring the challenged examinations to measure "merit and fitness" and to be periodically reviewed to determine their "validity and reliability." N.Y. Const., Art. 5, § 6; N.Y. Educ. Law §§ 2569(1) and 2590-j(3)(a)(1). This Court acknowledged in *Davis*[7] that such statutory provisions continue to require a strict examination of testing procedures, at least where those procedures have racially discriminatory effects. 48 L.Ed.2d at 611-14.

3. Even if the 1972 decision of the court of appeals had been wrong under the *Washington* v. *Davis* constitutional

[7] Contrary to the assertion of the petition (p. 11), *Washington* v. *Davis* was not "a § 1983 case," but rather was a case brought under the due process clause of the Fifth Amendment, under 42 U.S.C. § 1981, and under D.C. Code § 1-320. 48 L.Ed.2d at 603.

standard and could not be sustained on independent statutory grounds, there would be no justification for reopening the underlying determination of liability in this case. That determination is embodied not in the court of appeals' preliminary injunction decision but in the July 1973 final consent judgment. In entering into this consent judgment, the parties accepted a compromise settlement and waived their rights to litigate the liability issues. *United States* v. *Armour & Co.*, 402 U.S. 673, 681 (1971). The subsequent resolution in *Davis* of one legal issue among the many that were implicated in the parties' decision to settle does not constitute the "extreme hardship" or "oppression" necessary to justify the reopening and modification of a consent judgment. *United States* v. *Swift & Co.*, 286 U.S. 106, 119 (1932); *Humble Oil & Refining Co.* v. *American Oil Co.*, 405 F.2d 803, 813 (8th Cir. 1969); *Lubben* v. *Selective Service System*, 453 F.2d 645, 651 (1st Cir. 1972). The absence of any such circumstances is particularly apparent in view of the fact that the consent judgment in this case simply imposes the same requirements as Title VII of the Civil Rights Act of 1964, as amended in 1972 to cover public employers, 42 U.S.C. § 2000e *et seq.*, would impose even if this suit had never been filed. If the consent judgment were reopened, plaintiffs would presumably be free to invoke those Title VII standards directly via an amended complaint. See *Washington* v. *Davis*, 48 L.Ed.2d at 614.

4. Even if the Court does not agree with the reasons set out under points 2 and 3 above, it should nonetheless deny this petition because a pending appeal by the party to this case which is charged with primary representation on these issues, the Board of Examiners, is now raising the same issues before the court of appeals.[8]

[8] See p. 5, *supra*. For the convenience of the Court, respondents are lodging with the clerk of this Court copies of the briefs which are being submitted to the court of appeals by the appellant Board of Examiners and by the respondents.

5. As for the constructive seniority relief mandated by the court of appeals, CSA is admittedly a proper party to seek certiorari. However, that relief presents no novel or unsettled issues.

(a) This relief does not conflict with any seniority excessing system prescribed by New York law.[9] Plaintiffs have not been granted "modification or elimination of the existing seniority system, but only an award of the senority status they would have individually enjoyed under the present system but for the illegal discriminatory refusal to hire." *Franks* v. *Bowman Transportation Co.*, 47 L.Ed.2d 444, 458 (1976). To the extent that New York law could conceivably be interpreted to require conduct which perpetuates the effects of the prior unlawful selection systems, it would stand as an obstacle to the attainment of rights granted by the United States Constitution and federal statutes, and it would be in direct contravention of federal court orders determining those rights. It would, therefore, be clearly invalid under the supremacy clause of the Constitution. See *DeCanas* v. *Bica*, 47 L.Ed.2d 43, 53 (1976); *Colorado Anti-Discrimination Commission* v. *Continental Air Lines, Inc.*, 372 U.S. 714 (1963).

(b) There is no "conflict" between the relief granted by the court below and the decisions of the New York Court of Appeals cited at pages 16 and 19 of the petition. These decisions concern the powers of state agencies and state courts under state law, and they are therefore inapposite to the question presented here, which is one of federal judicial power to remedy violations of federal statutory and constitutional provisions.

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[9] Petitioner erroneously cites N.Y. Educ. Law § 2585 (McKinney 1970), which does not appear to provide a seniority system for supervisory personnel. However, a newly enacted provision of N.Y. Educ. Law, § 2588(3)(b), seems to authorize such a system for layoffs. Ch. 251, McKinney's Session Law News at 1074 (Aug. 10, 1976).

(c) Petitioner's invocation of the "business necessity" doctrine provides no reason for this Court to review the decision below. Defendant's discriminatory selection practices were examined long ago and were found to be unrelated to job performance and "wholly irrelevant to the achievement of a valid state objective." 458 F.2d at 1177 (2d Cir. 1972). This Court has firmly rejected the argument that the purposes served by a seniority system are of sufficient importance to justify perpetuation of the effects of such past discrimination by the denial of constructive seniority relief. *Franks, supra,* 47 L.Ed.2d at 465. Moreover, the relief granted by the court below contributes to the retention of qualified supervisors who were licensed on the basis of meaningful on-the-job evaluations, see 496 F.2d 820, 823-24 (2d Cir. 1974), whereas the seniority system advocated by petitioner would give preference to supervisors who were chosen on the basis of examinations found to be no "better than drawing names out of a hat," 458 F.2d 1167, 1175 (2d Cir. 1972). Such a system cannot be justified as a business necessity. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432 (1971); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425-35 (1975).

(d) The relief fashioned by the court of appeals is entirely consistent with this Court's decision in *Franks, supra,* in according constructive seniority not only to minority supervisors who failed prior discriminatory examinations (11a), but also to minority supervisors "who have heretofore established or can establish by the usual preponderance of the evidence" that they "have failed to apply for or take such supervisory examinations because they reasonably believed the supervisory examination to be discriminatory and unrelated to job performance" (30a). This Court has found "untenable" petitioner's contention "that this form of relief may be denied merely because the interests of other employees may thereby be affected," 47 L.Ed.2d at 468, and there appears to be no conflict in the circuits on the

availability of such relief to persons who were deterred from applying for employment or promotion by discriminatory practices.[10] The relief afforded by the court of appeals does nothing more than meet this Court's requirement that the individual victims of unlawful discrimination be granted constructive seniority as a necessary part of the "make whole" remedy to which they are entitled. *Franks, supra; Albemarle Paper Co., supra.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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[10] See *Acha* v. *Beame*, 531 F.2d 648, 656 (2d Cir. 1976); *Sagers* v. *Yellow Freight System, Inc.*, 529 F.2d 721, 731 (5th Cir. 1976); *Hairston* v. *McLean Trucking Co.*, 520 F.2d 226, 233-35 (4th Cir. 1975); *Jones* v. *Lee Way Motor Freight Inc.*, 431 F.2d 245, 247 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971); *United States* v. *Sheet Metal Workers Local 36*, 416 F.2d 123, 132 (8th Cir. 1969).